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STORMING THE BASTILLE. DETENTION CONDITIONS, THE RIGHT TO LIBERTY AND THE CASE FOR APPROXIMATION IN EU LAW

ABSTRACT

Over recent years, detention conditions within the European Union (EU) have come under the spotlight as an issue of extreme relevance. Concerns about appalling standards of living in places of deprivation of liberty have emerged transversally in the area of freedom, security and justice (AFSJ). The risk that poor detention conditions result in inhumane and degrading treatment – prohibited by Article 4 of the EU Charter of Fundamental Rights (CFREU) – has served to limit the operation of secondary EU law. This has occurred in the framework of forced movement of persons as between member states, and has mainly called into question the level of protection ensured in the state where the person will be transferred. This may hold true for both asylum law and mutual recognition in criminal matters. While the broader debate on detention conditions has hitherto focused on Article 4, the impact on the right to liberty under Article 6 CFREU has been somehow underexplored. This paper submits that detention conditions must be studied from the perspective of the right to liberty, and makes the case for approximation of detention conditions at EU law level.

1. Introduction

In the collective memory, there are events automatically associated with turning points in history: the Normandy landings as the beginning of Western Europe liberation from Nazi occupation; the Boston Tea Party as the prologue to the American Revolution; the storming of the bastille as the opening act of the French Revolution. Although only few inmates were interned at the bastille on the 14th of July, the storming of that political prison symbolised the overturning of the *ancien* – political, social, economic and legal - *regime*. This did not happen by accident.

Problems related to personal liberty arise from – and are to be discussed against – the broader legal and historical context in which they occur. The analysis of those issues comes with a reflection on public powers impinging upon individual personality.¹ Studying personal liberty from the perspective of its deprivation,² in particular, means examining a situation that is a precondition for the potential expression of any other aspects of individual personality. In this sense, personal liberty is indeed *special*: unlike other forms of liberty recognised over the centuries, it has been upheld continuously.³ Its uniqueness shines when we look at the apparent similarity of legal formulas that have protected it throughout history: namely, the claim not to be arrested *sine legale iudicio* (or *per vim, contra legem terrae* and the like).⁴ Another key feature of deprivation of liberty is its connection to security concerns. Personal liberty is regularly interfered with by public authorities for the purposes of crime control and, more broadly, in relation to the exercise of a polity's sovereign powers. However, deprivation of liberty can be carried out lawfully (ie not arbitrarily) as long as this happens in the cases

1 G Amato, *Individuo e autorità nella disciplina della libertà personale* (Milano, Giuffrè, 1967) 2 onwards.

2 Detention is used in a general sense, by equating it to deprivation of liberty. The issue of a difference between detention strictly understood and arrest is analysed afterwards. See on the topic S Trenchsel and S Summers, *Human Rights in Criminal Proceedings* (Oxford, Oxford University Press, 2006). 407.

3 See for instance Article 8 of the *Magna Carta*, stipulating that 'No widow shall be compelled to marry, so long as she prefers to live without a husband; provided always that she gives security not to marry without our consent, if she holds of us, or without the consent of the lord of whom she holds, if she holds of another'.

4 See Article 39 of the 1215 *Magna Carta*, which stated that 'No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor will we send upon him except upon the lawful judgement of his peers or the law of the land'. An important step in the crystallisation as a source of law is the Habeas Corpus Act 1679.

and according to the *procedures* strictly defined by the law. Any individual is entitled not to be subject to – and to challenge – arbitrary forms of deprivation of liberty: this is the right to liberty, the cornerstone of any liberal democracy under the rule of law.

The broad perspective required when approaching deprivation of liberty concerns the legal context and the very nature of detention. Attention must be paid to how rules *allowing for* and *governing* deprivation of liberty are drafted, interpreted and enforced. To this end, detention conditions are a key aspect of a polity understanding of personal liberty. Over the years, the Council of Europe (CoE) and the European Court of Human Rights (ECtHR) have played complementary – and equally important – roles. On the one hand, the European Prison Rules (EPR) constitute a guide for legislators, judges, law enforcement and prison officers in dealing with persons deprived of liberty.⁵ The European Committee on the Prevention of Torture (CPT) has fulfilled a pivotal task of watchdog over European places of detention. On the other, the ECtHR has significantly relied on the EPR when finding Contracting states responsible for violations of the European Convention on Human Rights (ECHR).⁶ The operative work of the CPT and the case-law of the ECtHR on detention conditions brought to the fore the systematic and widespread problem of poor detention conditions in Europe. They have done so mainly through the lenses of Article 3 ECHR, which establishes the absolute prohibition of inhumane and degrading treatment.⁷ Not surprisingly, therefore, for long problems of detention conditions have remained nearly exclusively in the remit of the CoE broadly understood.⁸

Over the last decade, however, living standards in facilities of deprivation of liberty have increasingly become an issue for the European Union (EU) in the two main domains of asylum and migration law, on the one hand, and judicial cooperation in criminal matters, on the other. These areas, constituting the backbone of the EU area of freedom security and justice (AFSJ), share the rationale underlying their creation. The creation of the AFSJ by the Amsterdam Treaty – and the embryonic forms of member states' cooperation preceding it – built upon the need to offset the drawbacks of the completion of the internal market and the creation of an area of free movement. In order to – inter alia - avoid irregular secondary movement within the EU, the Dublin Convention established a system of allocation of state responsibility for the examination of asylum claims. Once the state responsible has been identified according to the criteria laid down in EU law, the asylum seekers – if not already in the state responsible – will be transferred there. In criminal law, the adage that cooperation amongst criminals (facilitated by free movement) requires cooperation against criminals (amongst member states) has underpinned the creation of a body of measures based on the principle of mutual recognition. The first and most prominent of these initiatives – the European Arrest Warrant Framework Decision (EAW FD)⁹ – allows for automatic recognition of an intra-EU arrest warrant issued by a judicial authority to another, and subsequent surrender of the person concerned.

While the two realms are different in many respects, they also present a number of commonalities. Firstly, they set up a system of forced transfer within the EU, whose main aim is to compensate for drawbacks of free movement: in other words, to make the Union as a borderless area

5 Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, accessible at <https://archive.is/OTDXp>

6 One of the latest major decision is the pilot-judgment *Torreggiani and Others v Italy*, App. No. 43517/09, 08 January 2013.

7 The provision reads as follows: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

8 The main publications in the area homes on the system of the Convention and the case-law of the ECtHR. See for example Van Zyl Smit D, Snacken S (2009) *Principles of European prison law and policy: Penology and human rights*. Oxford: Oxford University Press; Snacken S (2011) *Prisons en Europe. Pour une pénologie critique et humaniste*. Bruxelles: Larcier.

9 Council Framework Decision (JHA) 584/2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

sustainable. Secondly, the system rests on the combined operation of dynamic and static rules. The former are the ones regulating the forced transfer from one state to the other. Whereas the latter, amount to the provisions establishing a level-playing field throughout the EU: asylum procedures and reception conditions as far as asylum law is concerned; defence rights and substantive criminal law in the case of judicial cooperation. They both feature exceptions capable of limiting their application – eg *ne bis in idem* in the EAW FD – and are founded on the principle of mutual trust, namely the presumption that member states comply with fundamental rights. For years, the EU Court of Justice (CJEU or the Court) has ruled out the non-application of EU law for (possible) fundamental rights violations. In both asylum (*N. S.*)¹⁰ and criminal (*Căldăraru*)¹¹ law, however, the system of (quasi) automatic interstate transfer has been halted by degrading detention conditions in the state to which the person would have been transferred. Similarly to the ECtHR's case-law, the Court has drawn a red line when violations of Article 3 ECHR and Article 4 of the EU Charter of Fundamental Rights (CFREU or the Charter)¹² were at stake.

Against that background, the debate on detention conditions has been mainly one of *exceptionalism*, understood as revolving around *exceptional* issues of inhumane and degrading treatment. The conceptual and systematic location of detention conditions in EU law has been somehow neglected. Such a gap in the scholarship has prevented the construction of a coherent approach to relevant questions throughout the different areas where detention conditions can play a significant role. The present paper aims to offer a new perspective. Firstly, it places questions of detention conditions – and deprivation of liberty broadly – within the broader context of the system of forced movement within (and from) the EU. On the basis of that contextualization, it argues for the elaboration of a new right to liberty in EU law. Here, the newness lies in understanding detention conditions as part and parcel of the established procedures requirement at the basis of the right to liberty. Such an approach has significant implications. It puts in the limelight the relevance of 'ordinary' poor detention conditions beyond the exceptionalism of Article 4 CFREU. It reveals how widespread the importance of detention conditions in the operation of EU law can be. It highlights the connection between detention conditions and the right to liberty, on the one hand, and the functioning of detention centres, on the other. Thirdly, it makes a case for approximation of detention conditions in the Union.

The article is structured as follows. Section 2 places the topic in the broader context of forced movement of persons within the EU. It is shown that the main role for detention conditions in EU law is connected to the intra-Union system of transfer of persons, and to the interaction between static and dynamic rules on detention. Section 3 explains how detention conditions have become an issue for EU law through the case-law of the CJEU on Article 4 CFREU. The landmark *N. S.* and *Căldăraru* cases are presented, enshrining the principle that the presumption of mutual trust – and therefore the transfer of persons which on that presumption is built - can be derogated from only in exceptional circumstances. This leads into Sections 4, 5 and 6. The article introduces the understanding of the right to liberty adopted here, and focuses on the role for detention conditions as part of the established procedures requirement. Thereafter, the two main arguments of the paper unfold and are considered

10 Joined cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* EU:C:2011:865.

11 Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* EU:C:2016:198.

12 On the basis of Article 52 CFREU and the Explanations to the Charter, the two provisions have the same meaning and scope.

jointly with the findings previously exposed. The relevance of detention conditions under Article 6 CFREU is discussed. It is submitted that poor detentions constitute a breach of an essential aspect of the right to liberty and, therefore, can underlie limitations to the inter-state transfer of persons. In the light of the foregoing, the article argues that approximation of detention conditions in EU law is needed through a systematic interpretation of primary and secondary EU law.

2. Setting the Scene. Detention and Forced Transfer of Persons within the EU

The AFSJ was notoriously triggered by the need to control the side-effects of the construction of the Union as a borderless area.¹³ This response has had multiple expressions. There is the purely external dimension, materialising eg in agreements with third countries and security operations.¹⁴ We have seen the strengthening of the outer borders of the EU, which encompasses measures such as the Schengen Borders Code and the European Border and Coast Guard Agency (better known as Frontex).¹⁵ These measures aim to prevent third-country nationals from irregularly crossing the Union frontiers and entering the EU without a valid title. The internal dimension addresses instead situation of illegality and irregular secondary movement occurring within the EU territory.

While detention is not explicitly mentioned as an option in the relevant EU legislation in the former scenario,¹⁶ deprivation of liberty is an essential tool for ensuring the effectiveness of the internal dimension. To this end, three main categories of persons can be detained: asylum-seekers; third-country nationals pending removal; suspects or convicted of a crime. Different as these groups can be – especially asylum-seekers and criminal offenders – they present structural commonalities.

In all three cases the EU legislature decided to use detention, the most serious form of interference with personal liberty exercised by public powers over an individual. Coercive measures have a precise meaning: through them, a polity states a situation of risk posed by a person to a very important and usually supra-individual interest. The sections below show that these types of detention have a common horizon: namely, the preservation of the Union as a borderless area. Their functioning rests on the combined operation of static and dynamic rules. The latter regulate the transfer of the person within or outside the EU, whereas the former establish common rules meant to facilitate the implementation of Union law. Thereby, the EU sets up a system of forced movement with the view to preserving the safe exercise of free movement. The next three sections present rationale and details of relevant rules to detention conditions in asylum, immigration and criminal law.

2.1. Asylum and Migration Law

2.1.1. Policy and Legal Background

EU asylum and immigration law is part of the broader project of creating an area of freedom, security and justice. As is well known, the abolition of internal frontiers was linked from the very start

13 See among many V. Mitsilegas, J. Monar, and W. Rees, *The European Union and Internal Security* (Basingstoke: Palgrave Macmillan, 2003); V. Mitsilegas, *EU Criminal Law*, (Oxford ; Portland, OR: Hart Pub, 2009), 5 onwards.

14 C. Matera, "An External Dimension of the AFSJ? Some reflections on the nature and scope of the externalisation of the AFSJ domains" in Fletcher, Herlin-Karnell, Matera, *The European Union as an Area of Freedom, Security and Justice* (London: Routledge, 2016).

15 L. Heschl, *Protecting the Rights of Refugees Beyond European Borders: Establishing Extraterritorial Legal Responsibilities* (Cambridge: Intersentia, 2018) p. 141 onwards.

16 The Schengen Border Code regulates entry in the Union by TCNs. The Regulation sets up a system of border surveillance to prevent unauthorised border crossing, and to take measures against who has crossed the border illegally (including the apprehension of the latter individuals crossing). The use of coercive measures is also envisaged where border guards are required to prevent the entry into the Member State concerned by non-EU citizens who are not in compliance with the conditions established in the Regulation. Regulation (EC) No 562/2006, Art 13.

to the strengthening of the Union's external borders. The embryos of the Union commitment to asylum and immigration law materialised shortly after the infamous Commission white paper on the completion of the internal market.¹⁷

On the one hand, the Dublin Convention was adopted in 1990, establishing a first system of allocation of responsibility on asylum claims amongst (some) Member States. On the other, the 1992 Maastricht Treaty introduced EU competences in certain areas of justice and home affairs for achieving the free movement of persons, including asylum and immigration policy.¹⁸

The Dublin Convention itself was conceived of as a system for resolving 'conflicts of jurisdiction' over the examination of asylum claims.¹⁹ EU asylum and migration law was born with the need to compensate for the opening of internal frontiers in mind, and built upon an approach where 'the movement of asylum seekers and legal and illegal immigrants, on the one hand, and of terrorists and criminals, on the other, were conceptually blurred as negative consequences of the abolition of borders'.²⁰

Since that first step, many more have been taken in policy and legal terms. The Union now has a Common European Asylum System (CEAS), which aims to establish a common legal framework on receptions conditions, procedures of asylum and recognition of the status of refugee. Under Title V TFEU, the EU is currently empowered to adopt measures on border checks, asylum and immigration.²¹ The objectives of building an area of freedom, security and justice 'without internal frontiers, and with full respect for fundamental rights'²² signals that the two centrepieces, while not incompatible a priori at all, do not necessarily overlap. Policy documents confirm the twofold soul of the Union approach, with the objective of a high standard of protection going hand in hand with the prevention or reduction of irregular secondary movement within the EU, and increase in mutual trust between Member States.²³

The Union aims for an efficient and well-managed migration, asylum and border policy, which rests on the implementation of the CEAS and the fight against irregular migration. Actions on those ambits contemplate measures covering a very broad spectrum of situations, including decisions on short and long-term visas to entering alerts in the Schengen Information System on persons not allowed to stay in the EU territory or interception operations at the maritime borders of the Union.²⁴

In that context, a major role is played by the allocation of responsibility over the examination of asylum claims and the pursuit of a common return policy. Administrative detention is key to the EU endeavour, and can take place in asylum law and irregular migration management. The former scenario sees detention used pending the examination of an asylum claim, determination of the state responsible for that purpose, or preparation of the transfer from the state where the asylum-seeker is to the state having responsibility. In irregular migration, detention serves to secure the completion of return procedures of migrants from a Member State to outside the Union. While governed by

17 For an historical analysis of the path preceding the Dublin Convention and the Maastricht Treaty, see A Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford, Oxford University Press, 2009), 30 onwards.

18 OJ C191/4, Title VI.

19 S Peers. *EU Justice and Home Affairs Law* 1, 295.

20 A Hurwitz, *The Collective Responsibility of States to Protect Refugees*, 33.

21 For an analysis of the institutional framework under the Amsterdam Treaty, see S Peers, 'From Black Market to Constitution: The Development of the Institutional Framework for EC Immigration and Asylum Law' in S Peers and N Rogers (eds), *EU Immigration and Asylum Law* (Leiden, Martinus Nijhoff, 2006), 19.

22 EUCO 79/14, 1.

23 Stockholm Programme, 69.

24 On the Commission agenda on interoperability of databases for the purposes of migration control, see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0597&from=EN>.

different rationales, the two types of deprivation of liberty are highly interconnected and share key features. Once the person is refused asylum, and is given no other qualification to stay in the territory, s/he will most probably be subject to EU rules on returns, including those concerning pre-removal detention.²⁵

Detention of TCNs is linked to a system of forced transfer of persons within or outside the EU. The right to liberty – which applies regardless of the nature of detention at stake – is primarily concerned and comes into play under Article 5(1)(f): the lawful arrest or detention of a person to prevent effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. Administrative detention is also a key step to criminalisation of migration in Europe: namely, the use of tools typical of criminal law for the purposes of migration control.²⁶

2.1.2. *The Reception Condition Directive and the Dublin Regulation*

The Common European Asylum System (CEAS)²⁷ includes two instruments relevant to the detention of TCNs pending examination of an asylum claim: Directive 2013/33/EU (or the Reception Conditions Directive),²⁸ Regulation (EU) No 604/2013 (or the Dublin III Regulation).²⁹ The former is a ‘static’ instrument, as opposed to the ‘dynamic’ nature of the Dublin III Regulation. The Reception Conditions Directive aims to establish a level playing field on the treatment of TCNs during examination of their asylum claims. Therefore, the Directive presents no significant cross-border element. Conversely, the Dublin Regulation is concerned with the allocation of responsibility for the examination of the asylum claim on the best-placed Member State.

As observed, the Dublin Regulation sets out a system of mutual recognition in that the occurrence of one of the Dublin criteria creates a duty for one Member State to take charge of an asylum seeker and thus recognize the refusal of another Member State (which transfers the asylum seeker in question) to examine the asylum claim.³⁰ As for individual guarantees and detention conditions, the Regulation refers to the rules established in Directive 2013/33/EU.

The Reception Conditions Directive establishes common standards of living conditions of asylum-seekers within the Union. Detention is defined as the ‘confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his freedom of movement’.³¹ An applicant cannot be deprived of liberty ‘for the sole reason that he or she is seeking international protection’.³² More specifically, the Directive provides that detainees should have effective access to the necessary procedural guarantees, such as judicial remedies before a national

25 For an overview on the use of asylum detention and interaction with pre-removal deprivation of liberty, see M Walter-Franke, ‘Asylum Detention in Europe: State of Play and Ways Forward’ (Jacques Delors Institut, Policy Paper No. 195 (Berlin) May 2017).

26 V Mitsilegas, *The Criminalisation of Migration in Europe. Challenges for Human Rights and the Rule of Law* (Berlin, Springer, 2015), 77 onward.

27 The CEAS, which consists of the instruments I refer to in this chapter, has been recently recast by a comprehensive reform. See on it F Ippolito and S Velluti, ‘The Recast Process of the EU Asylum System: A Balancing Act Between Efficiency and Fairness’ *Refugee Survey Quarterly* 30:3, 24-62.

28 Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, 29.6.2013.

29 Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a TCN or a stateless person (recast), OJ L 180/31, 29.6.2013.

30 V Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual’ (2012) *Yearbook of European Law* 31:1, 334.

31 Directive 2013/33, Art 2(1)(h).

32 Ibid, recital 15.

judicial authority.³³ Member States are required to detain the applicants in specialised detention facilities. When Member States have no option but to resort to prison accommodation, the applicants must be kept separately from ordinary prisoners. Migrants in detention 'should be treated with full respect for human dignity'.³⁴ As for communication with applicants in detention, only representatives of the United Nations High Commissioner for Refugees (UNHCR) (or organisations working on behalf of it, upon previous agreement with the Member State concerned), family members, legal advisers and persons representing relevant NGOs recognised by the Member State are entitled to access the centres in this respect. Access may be limited by national law, on grounds of security, public order or administrative management of the detention facility. Applicants must be provided with the information regarding the rules operating in the centres and their rights in an understandable language. However, Member State may derogate from this obligation in duly justified cases and for a reasonable period of time, where detention takes place in a border post or at a transit zone, barring the cases established by Article 43 of the Procedures Directive.³⁵

2.1.3. *Detention Pending Removal*

Directive 2008/115/EC is the first piece of legislation in immigration adopted under a co-decision procedure. The approval of the Directive proved significantly lengthy and cumbersome,³⁶ and the final text has been criticised for crystallising Member States' (bad) practices in EU law.³⁷

The Directive applies to TCNs staying illegally on the territory of a Member State. Detention must be used only when other less coercive measures would not be sufficient to the aim of the Directive, which is to prepare the return or to carry out the removal process. The migrants should be located in specialist detention facilities, and they should be treated in a humane and dignified manner with respect for their fundamental rights.³⁸ As far as detention conditions are concerned, the Directive states the obligation to provide detainees with information explaining the rules applied in the facility as well as their rights and obligations. However, the Directive stipulates that visits to the centres from relevant and competent organisations or bodies may be subject to authorisation.³⁹ Article 16(1) provides that migrants in pre-removal detention cannot be accommodated in prison, unless situations occur where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff.⁴⁰ The CJEU has upheld the difference between detention pending removal and criminal detention. In this sense, a federal state may not derogate the mentioned rule because one of its constituent states has no specialised detention facilities, but must ensure that accommodation in specialist facilities in other federated states is provided.⁴¹ Furthermore, Article 16(1) cannot be derogated from where the person concerned consents to that.⁴²

³³ Ibid, recital 20.

³⁴ Ibid, recital 18.

³⁵ Ibid, Art 10.

³⁶ See, most of all, D Acosta, 'The Good, The Bad and The Ugly in EU Migration Law: is the European Parliament becoming Bad and Ugly?' (2009) *European Journal of Migration and Law* 11, 19-39.

³⁷ ECRE, *Information Note on the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, July 2009.

³⁸ Ibid, recitals 16-17.

³⁹ Ibid, Art 16(4) (emphasis added).

⁴⁰ Directive 2008/115, Art 18(1).

⁴¹ Joined Cases C-473/13 and C-514/13, *Adala Bero v Regierungspräsidium Kassel and Ettayebi Bouzalmate v Kreisverwaltung Kleve*, EU:C:2014:2095, para 32.

⁴² Case C-474/13 *Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik*, EU:C:2014:2096, para 23.

Two main conclusions may be drawn from the legislation on detention conditions in asylum and migration law. Firstly, the Union has not engaged with the establishment of common standards. Secondly, there is a strong connection – highlighted by the Return Directive itself – between migrants’ rights in detention and functioning of the centres. Given the conceptual affinity between the rules applied in the centres and individual rights, the absence of any approximation effort in an area where the Union has laid down a EU-wide framework may lead to undesirable results at national level. An example in this respect is the Italian legal framework, where the only – extremely vague – rules on the system of specialised detention facilities can be found in an executive regulation implementing law on foreigners (D. lgs. 286/1998).

2.2. Criminal Law

Judicial cooperation within the EU is based on the principle of mutual recognition, according to which a judicial order issued in a member state against a person suspected or accused of a crime in another state, must be recognised by the latter automatically and without further formalities, unless grounds for refusal apply.⁴³ By doing so, it means to substitute the previous system of extradition in inter-state cooperation in criminal matters,⁴⁴ with the view to preventing the existence of any criminals’ safe heavens within the EU and ensuring the safe exercise of free movement by the Union’s citizens and businesses.⁴⁵ Similarly to asylum law, judicial cooperation rests on the combined operation of static and dynamic rules. The latter are laid down in instruments of mutual recognition such as the EAW FD, each of them focusing on a specific judicial order and governing the recognition of the latter as well as the transfer of the person concerned. Static provisions are meant to foster the smooth functioning of judicial cooperation, by establishing a level-playing field as between member states.

Two main groups of static rules can be identified. On the one hand, we have rules approximating substantive criminal law. As many instruments of secondary EU law state, the adoption of common rules on definition of offences and levels of penalties pursuant to Article 83 TFEU is – inter alia – meant to facilitate judicial cooperation and prevent potential offenders from choosing the forum where to offend because more convenient.⁴⁶ The connection to the compensation of the opportunities for crime offered by free movement is apparent.⁴⁷ On the other hand, there are instruments aimed to ensure minimum standards of individual safeguards in criminal proceedings and EAW procedures. These are, for example, the Directives on the right interpretation and translation, to information, and access to a lawyer in criminal proceedings and EAW procedures.⁴⁸ The introduction

43 As well known, the principle was first applied in the context of free movement of goods. See on this K. Armstrong, “Mutual Recognition” in C. Barnard and J. Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Oxford: Hart Publishing, 2002), pp.225–268.

44 M. Platcha, “Non-Extradition of Nationals: A Never-Ending Story?” (1999) 13 *Emory International Law Review* 77.

45 See the 1999 Tampere Programme.

46 See for example SEC(2011) 1217 final.

47 This understanding of opportunity as the root of illegal activities lies at the heart of the so-called Rational Choice Theory (RCT) of crime, a criminological theory building on economic theory of crime and deterrence-based, utilitarian approaches to punishment. See B. Hindess, ‘Rational Choice Theory’ in W. Outhwaite and T. Bottomore, eds., *Blackwell Dictionary of Twentieth-Century Social Thought* (Oxford: Blackwell Publishers, 1993), 542.

48 Council Directive (EU) No 2010/64 [2010] OJ L280/1; Council Directive (EU) No 2012/13 [2012] OJ L142/1; Council Directive (EU) No 2013/48 [2013] OJ L294/1.

of minimum standards throughout the EU aims to increase mutual trust, which in turn is life-blood of judicial cooperation.⁴⁹

Four instruments are relevant for the present discussion, namely the FDs on: the EAW, the transfer of prisoners (2008/909/JHA),⁵⁰ probation measures (2008/947/JHA),⁵¹ and pre-trial measures alternative to detention (2009/829/JHA, or ESO FD).⁵² The creation of a borderless area increases the possibility for persons to be investigated, tried and convicted in member states other than those of nationality. The EAW aims to replace extradition procedures with a smoother and swifter system of surrender of suspects and convicted persons between judicial authorities. Research has consistently shown that judicial authorities are not inclined to grant pre and post-conviction measures alternative to the deprivation of liberty to people not residing therein, as they cannot be monitored properly.⁵³ Furthermore, people convicted to custodial penalties in other Member States might have reduced chances of reintegration than they would have in their countries of nationality or residence. For that reason, the EU enacted instruments to overcome these problems through a system of mutual recognition (free movement) of custodial penalties (FD 909/2008), probation measures (FD 947/2008) and pre-trial measures alternative to detention (FD 829/2009).

Although none of these instruments explicitly refers to detention conditions, the analysis below shows that the latter can be highly relevant to the implementation of those measures in two ways. Firstly, the FDs – and the EAW in particular - have been long criticised for not featuring possible violations of fundamental rights as a ground for refusal of recognition and execution. This has been so despite the FDs – Article 1(3) in the case of the EAW FD – provide that they shall not have the effect of modifying the obligation to respect fundamental rights. Secondly, the four FDs entails the intra-EU transfer to a state where the person might or will be detained. This is certainly the case for the EAW and the FD on the transfer of prisoners. The aim of the FDs on pre and post-conviction measures alternative to detention is by definition that of transferring the person to a state where s/he will be set at free. However, the instruments provide the possibility for the national authority to turn the alternative measure in deprivation of liberty, eg where one of the conditions for its application are breached.

The absence of internal frontiers and fundamental rights protection are two distinct – though interrelated – pillars of the Union project. In a sort of autopoietic dynamic, legal integration is meant to secure free movement – as exemplified by the EAW FD – and to strengthen the presumption of mutual trust. The latter in turn foster and reinforces the process of further legal integration, as shown by the procedural rights Directives and their stated objective of facilitating mutual recognition. Detention is a key tool to preserving the EU as a borderless area: it deprives potential offenders of the choice of forum; it underpins the implementation of a common return policy; it supports the allocation of responsibility for asylum-claims and prevents irregular secondary movement within the EU broadly. Provisions on deprivation of liberty are disperse in different pockets throughout Union law, and no coherent picture of the role for detention conditions can be taken at present.

49 As the CJEU has stated recently, the high level of confidence underpinning mutual recognition can be justified as long as there are precise guarantees surrounding its operation. In the particular case at hand, the Court referred to the judicial oversight of the EAW.

50 Council Framework Decision (JHA) No 909/2008 [2008] OJ L 327/27.

51 Council Framework Decision (JHA) No 947/2008 [2008] OJ L 337/102.

52 Council Framework Decision (JHA) No 829/2009 [2009] OJ L 294/20.

53 E Cape and others (eds), *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Intersentia, 2007).

Next section presents the two main episodes concerning detention conditions in EU law. The *N. S.* and *Căldăraru* judgments show that – both in asylum and criminal law respectively – detention conditions have been addressed exclusively from the perspective of Article 4 CFREU.

3. Exceptional Circumstances. Detention Conditions as Degrading and Inhumane Treatment

One of the most controversial passages in *Opinion 2/13* concerned the understanding of mutual trust.⁵⁴ The latter was regarded by the CJEU as a general principle of EU law, on the basis of which member states must presume they comply with fundamental rights save in exceptional circumstances. The case-law of the CJEU before and after the *Opinion* is consistent with that statement. Two main cases of exceptional circumstances are to be mentioned here.

The first breakthrough was the *N. S. and M. E.* judgment,⁵⁵ revolving around the transfer of two asylum-seekers from England and Ireland to Greece under the Dublin II Regulation.⁵⁶ The Court reaffirmed the long-standing principle that, where states exercise discretion left by EU law, they are implementing the latter and therefore are bound by the Charter under Article 51 CFREU. The principle of mutual trust founding the CEAS implies the presumption that asylum seekers are treated in compliance with the Charter. Where the state cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions in the receiving state would expose the applicant to a serious risk of inhumane and degrading treatment, a transfer would be unlawful and make the sending state liable under Article 4 CFREU.⁵⁷

Therefore, the transferring state must continue to examine the criteria set out in the Dublin Regulation, to establish whether other criteria enable another state – even the transferring state itself – to be identified as responsible for the examination of the asylum application. While praised for the contribution in terms of fundamental rights protection, the judgment undoubtedly set the bar high: overcoming the presumption would require systemic deficiencies in both reception conditions and asylum procedures.

The *Căldăraru* judgment is a foundation in the interpretation of the EAW. It opened the door to halting the operation of the EAW on grounds other than those established in Articles 3 and 4 EAW FD, and brings to the fore the relevance of detention conditions to judicial cooperation. The CJEU had to deal with the possibility to refuse the execution of a EAW on the basis of the risk of inhumane treatment in the issuing Member States (Romania and Hungary), due to poor detention conditions.⁵⁸

The Court accorded Article 1(3) EAW FD a major role for fundamental rights protection. The CJEU found that Article 1(3) obliges Member States to respect the prohibition of inhumane and degrading treatment, as stated in Article 4 CFREU. This implies that, where the executing judge has objective, reliable, specific and properly updated evidence showing that there are deficiencies, which may be ‘systemic or generalised, or which may affect certain groups of people, or which may affect certain place of detention, with respect to detention conditions in the issuing Member State’, that judge must, pursuant to Article 15(2) EAW FD, request that the issuing judge provide supplementary

⁵⁴ *Opinion 2/13*, EU:C:2014:2454.

⁵⁵ As well known, the ruling interiorized the principles stated in *MSS v Belgium and Greece*, ECtHR judgment of 21 January 2011 Application no. 30696/09. Among many commentaries, see V Moreno-Lax, ‘Dismantling the Dublin System: M.S.S. v. Belgium and Greece’ (2012) *European Journal of Migration and Law* 14, 1–31.

⁵⁶ Joined cases C-411/10, *NS v Secretary of State for the Home Department* and C-493/10, *ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, [2011] ECR I-13905.

⁵⁷ *NS*, Court’s judgment, paras 86–96.

⁵⁸ *Aranyosi and Căldăraru*, EU:C:2016:198.

information (emphasis added). The decision on the surrender must be postponed until supplementary information is obtained, allowing it to exclude the risk of inhumane treatment. Should that risk not be discounted within a reasonable timeframe, the executing judge is to decide whether the surrender procedure should be brought to an end. Meanwhile, the person concerned should be held in custody only in so far as the duration of the detention is not excessive, on the basis of the requirement of proportionality laid down in Article 52(1) of the Charter.⁵⁹

The *Căldăraru* judgment could have far-reaching consequences. Firstly, the CJEU established a link between Article 1(3) EAW FD and the obligation to respect fundamental rights in relation to the execution of a EAW. The Court explicitly provided for to the non-implementation of EU law, in case of the risk of a fundamental rights violation. Granted, what was at stake in *Căldăraru* was the absolute prohibition enshrined in Article 4 CFREU. Other fundamental rights can be balanced, as is the case of the right to liberty. One could not expect the application of the *Căldăraru* to test any fundamental rights violations. This nonetheless, the Court acknowledged that Article 1(3) EAW FD can give the basis for limiting the implementation of mutual recognition. Furthermore, the conditions set out by the Court for the request of supplementary information (which may in turn lead to postponement and non-execution of the EAW) are not cumulative, as the deficiencies can be systemic or affect certain groups of people or places of detention.

The CJEU has dealt with detention condition only through the lenses of Article 4 CFREU. However, it should be recognised that the Luxembourg judges have received no questions on possible alternatives legal interpretation of the role for detention conditions in EU law. Next three sections reconstruct a more systematic understanding of living standards in detention facilities, beyond (and below) the exceptional threshold of inhumane and degrading treatment. The discussion is placed within the EU context of inter-state transfer of persons. Firstly, it is submitted that a new approach to the right to liberty is needed, where detention conditions are part of the requirement that deprivation of liberty be carried out according to the procedures established by law. That framework is thereafter applied to the dynamic and static dimension of forced movement within the EU. On the one hand, poor detention conditions undermine the essence of the right to liberty and therefore must limit the operation of mutual recognition. On the other, a case is made for the approximation in EU law through what is hereby called *proceduralisation* of detention conditions.

4. The Right to Liberty in Europe and Detention Conditions

The Union has regularly upheld its uniqueness as a legal order, with autonomy being one of the key words in the EU's - and the CJEU's notably – vocabulary.⁶⁰ Fundamental expression of this endeavour is the Court's use of the autonomous concept.⁶¹ For reasons of uniformity, equality and effectiveness of EU law certain concepts require a Union-wide understanding, and their definition cannot be left to the national authorities.⁶² It is hereby submitted that the right to liberty calls for a EU-specific interpretation. In this sense, the right to liberty must be placed in the specific context of

⁵⁹ Ibid, para 101.

⁶⁰ Just to mention some of the most famous example, *Kadi v Council of the European Union* (C-402/05 P) EU:C:2008:461; [2008] 3 C.M.L.R. 4; *Opinion 2/13* EU:C:2014:2454; [2015] 2 C.M.L.R. 21.

⁶¹ V. Mitsilegas, "Managing Legal Diversity in Europe's Area of Criminal Justice: e Role of Autonomous Concepts" in R. Colson and S. Field (eds), *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom Security and Justice* (Cambridge: Cambridge University Press, 2016), p. 127.

⁶² For an analysis of the use of the autonomous concept in the context of the European arrest warrant, see L. Mancano, "Judicial Harmonisation through Autonomous Concepts of European Union Law: The Example of the European Arrest Warrant Framework Decision", *European Law Review*, 2018, 43(1), 69-88.

intra-EU transfer of persons. In line with Article 52(3) CFREU, this research sees the arbitrariness test under Article 5 ECHR as the starting point for the elaboration of a right to liberty that goes beyond the existing standard of protection provided for in the ECtHR's and CJEU's interpretation.

Article 6 CFREU states that 'Everyone has the right to liberty and security of the person'. According to the Praesidium's Explanations to the Charter, Articles 6 CFREU and 5 ECHR have the same meaning and scope.⁶³ Under Article 5 ECHR, 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'. The cases enumerated in Article ECHR is exhaustive, which signals the importance of strict rules on detention in systems based on the rule of law. Other than deprivation of liberty of minors, or of persons of unsound mind, alcoholics or drug addicts (Article 5(1)(d) and (e) ECHR), the following grounds for deprivation of liberty are relevant here: enforcement of a custodial penalty; the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; detention on remand; and the lawful arrest or detention of a person to prevent him effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition –Article 5(1)(f).

Article 5(1)(f) ECHR is the reference used by the ECtHR for interpreting and assessing Member States' compliance with the right to liberty in the context of extradition procedures and pre-removal detention. This includes cases where asylum-seekers were involved. The test elaborated by the ECtHR for verifying that state laws and practices do not result in arbitrary deprivation of liberty – so violating Article 5 ECHR – requires for deprivation of liberty to be: carried out in good faith; closely connected to the grounds of detention relied on by the executing judicial authority; enforced in appropriate places and conditions; and of reasonable length in relation to the purposes pursued. The Strasbourg Court does not require that a decision on deprivation of liberty in this context be necessary and proportionate, but only that extradition procedures be ongoing and carried out with due diligence.⁶⁴

For the purposes of the present paper, two aspects deserve elaboration. Firstly, the combination of Articles 6 and 52 CFREU requires that *grounds for* and *procedures of* deprivation of liberty be drafted, enacted and enforced in an accessible and foreseeable way (legal certainty), and in compliance with the principle of proportionality. To ensure proper protection of the right to liberty, *certainty* and *proportionality* of deprivation of liberty should be tested across a spectrum of situations that goes from the legislative adoption of norms authorising detention to enforcement.⁶⁵

This assessment concerns EU and Member States' laws and practices, as the latter are subject to the Charter when they act in the scope of the application of EU law. Proportionality is inextricably linked to legal certainty. As the CJEU has recently stated in a case on the detention of an asylum-seeker, the right to liberty protects against arbitrariness through the requirement that detention rest on a clear, predictable and accessible legal basis.⁶⁶ Broadly-worded rules allowing for detention, or vague norms establishing procedures for deprivation of liberty may thus result in disproportionate (ab)use of force and thus violation of Article 6 CFREU.⁶⁷

63 CFREU, Art 52(7).

64 C Grabenwarter, *The European Convention for the Protection of Human Rights and Fundamental Freedoms: A Commentary* (Beck/Hart Publishing, 2014), 60 ff.

65 For an insight into this perspective, see L Mancano, 'The right to liberty in European Union law and mutual recognition in criminal matters' (2016), *Cambridge Yearbook of European Legal Studies* 18, 1-24.

66 Case C-528/15 *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others* EU:C:2017:213.

67 *Amuur v France* (Application no. 19776/92) (1996) 22 EHRR 533, paras 50-54.

Secondly, the ECtHR interpretation features places and conditions of detention as part of the arbitrariness test. It is submitted that the specific test on Article 5(1)(f) is the starting point to reconsider the very foundations of the right to liberty, applying to all cases of detention: namely, that detention condition must be carried out according to the procedures established by law. Detention conditions should be part of that requirement. Once the individual has been placed in detention, s/he is still being deprived of liberty, and this requires that clear and accessible legal procedures be applied to this continuing deprivation.⁶⁸ Penitentiary rules, and more in general detention conditions, are relevant to the right to liberty. Building on that understanding, two main scenarios come legally into play. Firstly, situations where living standards fall below the threshold established by the law would constitute a violation of the fundamental right to liberty. Secondly, the standards may be difficult to identify as they are too vague or not provided at all. This would raise problems in terms of compliance with Article 6 as well. To this end, a major role in this regard is played by regulation of facilities of deprivation of liberty. If enforcement and detention conditions are part and parcel of the procedures established by the law, the quality of rules governing the functioning of detention centres is key. As highlighted above, the EU law itself establishes a connection between detention centres and individual rights that can be exercised therein.

In the next two sections, the right to liberty as outlined here is applied to detention conditions in the dynamic and static dimensions of intra-EU transfer of persons.

5. The Right to Liberty, Detention Conditions and the Dynamic Dimension. Limiting the Operation of Forced Movement

Detention conditions are key to the forced movement of people within the EU, which in turn is based on the combined operation between static and dynamic rules. The establishment of a common framework facilitates the recognition (and therefore the transfer) of asylum-related decisions and judicial orders. One of the main reasons underlying the interplay between the static and dynamic dimension is the centrepiece of the whole AFSJ: the principle of mutual trust and the presumption of compliance with fundamental rights by member states, which applies save in *exceptional circumstances*.

The case-law on intra-EU transfer of persons has brought to the fore poor detention conditions as a major issue of inhumane and degrading treatment. That test, however, fails to take into consideration those situations that clearly result in a situation of arbitrariness without reaching that threshold. We have seen that, by understanding detention conditions as part of the legally established procedures requirement, two main relevant cases emerge: standards are established but they are inadequate, be it for the source that contained them and/or for they are so generic that cannot be used in practice; proper rules exist, but they are not complied with. At present, there is no test in EU law – both legislatively and judicially – allowing these scenarios to be addressed. The protection limbo experienced by those in detention conditions that are poor enough to be unlawful though not sufficiently so to meet Article 4 CFREU requires a specific response.

The latter lies in the understanding of the right to liberty put forward in the present paper. The ECtHR acknowledges detention conditions as a possible signifier of arbitrariness. The requirement that deprivation of liberty be carried out according to the procedures established by law means – *inter alia* – that it must be enforced on the basis of clear, foreseeable and accessible rules. The approach to

68 A di Martino, 'La Disciplina Dei CIE è Incostituzionale' (2012) *Diritto Penale Contemporaneo*.

the right to liberty espoused here draws upon the test elaborated by the ECtHR and adjusts it to the peculiarities of the EU legal order.

Living standards in detention facilities must be analysed in the context of intra-EU system of forced movement, which knows both a dynamic and static dimension. As to the former, the right to liberty is here used to consider whether – and if so, when – the quasi-automatic transfer of persons (and the mutual trust presumption on which the system is built) can be limited. The crucial question concerns the capacity for the right to liberty to fall under the *exceptional circumstances* clause and to result in non-execution of the transfer of the person concerned – be it under the Dublin Regulation or judicial cooperation. It goes without saying that possible violations of the absolute prohibition enshrined in Article 4 CFREU constitute exceptional circumstances. The right to liberty, however, is a relative one and can be limited.

The CJEU has recently found in *LM* that non-execution is an option where possible violations of the (relative) right to a fair trial are at stake.⁶⁹ That finding was stated in the context of the broader issue concerning the independence of the judiciary in Poland, the respect by that member state of the EU values under Article 2 TEU and the Article 7 TEU procedure activated by the European Commission as a reaction thereto.⁷⁰ In particular, the ruling concerned the risk of violation of the right to an independent tribunal, and therefore a breach of the essence of the right to a fair trial. After pointing out the key features of judicial independence, the CJEU confirmed the *Căldăraru* two-step test. Firstly, the executing judge must assess, on the basis of material that is objective, reliable, specific and properly updated, whether there is a real risk of such a right being breached. Secondly, the judge must assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that the requested person will run that risk. Furthermore, the executing judicial authority must request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk. If the risk cannot be discounted, the EAW must not be given effect.⁷¹ The *LM* case sets two conditions for the activation of the *exceptional circumstances* clause: the essence of the right must be threatened; the right at stake must be connected to the EU values under Article 2 TEU.

The question as to whether the issues discussed here comply with those two factors comes with a reflection on the role for detention conditions in the right to liberty, on the one hand, and on the role for the right to liberty in a polity founded on the rule of law, on the other. Detention conditions reflect the way in which deprivation of liberty is enforced and the procedures whereby detention is carried out. If those conditions are not in line with what the law prescribes, they are in violation of an essential requirement of the right to liberty. Likewise, a situation of arbitrariness would occur where standards do not live up to the required quality of the law. This might be due – as the Italian provisions on pre-removal detention centres show – to the source containing them, or the vacuous wording of the rules. While systemic deficiencies can contribute to the evidence of a real risk, the focus should be on the specific circumstances of the case – for the purposes of the present discussion, on the specific group of people or the particular place of detention.⁷² The essence of the right is in jeopardy where one of its pillars is likely to be violated. This is the case of the independency of the tribunal in relation to the right to a fair trial. The same may hold true with regards to detention conditions (as part of the established procedures requirement) and the right to liberty.

⁶⁹ Case C-216/18 PPU, *LM*, EU:C:2018:586.

⁷⁰ See the Commission proposal http://europa.eu/rapid/press-release_IP-17-5367_en.htm

⁷¹ *LM*, EU:C:2018:586, paras 73-79.

⁷² This is the wording used by the Court in *Căldăraru*.

Having shown that unlawful detention conditions (on paper or in action) undermine the essence of the right to liberty, the second step requires establishing a connection between the latter and Article 2 TEU. The right to liberty is probably the most basic stronghold protecting the individual against abuses of the public powers. The statement is not only confirmed by its role and consistent understanding throughout the centuries. In this sense, the *LM* finally revealed that the relative nature of a right does not downplay its centrality to the preservation of the rule of law. Though possibly subject to limitations, the right to liberty requires the latter being strictly interpreted. Firstly, no grounds for detention beyond those laid down in Article 5 ECHR are allowed. Secondly, deprivation of liberty is not lawful for the mere fact that it is carried out in one of the cases provided therein. It must not be arbitrary, which would happen instead when taking place contrary to procedures established by law. Accepting the possibility to operate an intra-EU transfer to a state where the person is likely to be placed in unlawful detention conditions would mean tolerating an attack against a centrepiece of the rule of law. Turning a blind eye on deprivation of liberty *in violation* or *in the absence* of clear and legally established procedures is opening the door to the systematic exercise of arbitrary powers over the individuals within the EU, which seems hardly compatible with the values enshrined in Article 2 TEU.

The reflection on the dynamic expression of detention conditions in the right to liberty and the intra-EU transfer of persons must be complemented by steps in its static dimension. This relates to the establishment of a level-playing field in the area, similarly to what happened in other realms. The following paragraph discusses the very first aspect to be considered in this respect, that is the existence of competence for the EU legislature.

6. The Static Dimension and the EU Legislative Competence. The Case for Approximation

The findings emerging from the foregoing discussion allow depict a more systematic and conceptually rounded place for detention conditions in EU law. Firstly, detention conditions must be part and parcel of the established procedures requirement under the right to liberty. This means that deprivation of liberty must be enforced following clear, accessible and foreseeable rules. Secondly, (1) detention conditions, (2) rights of the person deprived of liberty and (3) functioning of detention centres are inextricably linked. The connection between the first two elements is inherent in the understanding of the right to liberty put forward in this article. The conceptual tie between (1) and (2), on the one hand, and (3) on the other, is upheld by the very EU law presented above. According to the Return Directive, member states are required to systematically provide detainees with information explaining the rules applied in the facility *and* sets out their rights and obligations. The rules applied in detention centres logically determine what the conditions therein are. In other words, they are just a different angle from which to consider the issue of standards in facilities of deprivation of liberty. They are therefore part of the established procedures requirement, and are to comply with it. Thirdly, relevant legal rules lacking clarity, accessibility and foreseeability, or conditions that do not live up to the standards laid down in the law, result in a situation of arbitrariness and therefore undermine the essence of the right to liberty. Fourthly, those scenarios trigger the *exceptional circumstances* clause. This would result in the non-application of the presumption of mutual trust and the non-operation of the intra-EU transfer. Endorsing a system where there are substantive, objective and reliable evidence to believe that the person will be arbitrarily deprived of liberty would undermine one of the strongholds of the rule of law.

We have seen that detention conditions in EU law become particularly relevant in the context of intra-EU transfer of people, in turn based on the interaction between a static and dynamic dimension. Last section elaborated on the latter, and outlined possible interpretations concerning the execution of forced movement from one state to the other. The following lines deal with the static aspect, namely the level-playing field constituted by common standards on detention conditions. EU asylum law features broadly-worded provisions on the reception conditions of asylum-seekers, whereas no rules at all are laid down as far as irregular migration and criminal law are concerned. This research considers the very existence of a legal basis in the Treaties for the establishment of common standards in this area.

The case for approximation of detention conditions in EU law is both principled and functional. The right to liberty heavily relies on legal certainty, which materialises in the cases and the procedures requirements especially. The (quasi) automatic system of forced movement of persons within the EU requires a broader and deeper application of that requirement. Building on the understanding of Article 6 CFREU stated here, it is argued that common standards should be established throughout the Union for detention conditions are part of a centrepiece of the right to liberty. Bringing detention conditions under the umbrella of EU would also entail an additional layer of monitoring, constituted by the CJEU's oversight and the Commission's power under Article 258 TFEU for compliant member states. There are, however, also pragmatic reasons to support action from the EU legislature. The procedural rights Directives were explicitly adopted with the view to increasing mutual trust as between member states, which in turn is key to fostering the smooth operation of mutual recognition – and the intra-EU transfer of persons broadly. The argument stated in the previous paragraph and the CJEU's case-law highlight that flaws in the static dimension can compromise the proper functioning of forced movement.

The relevant articles concerning asylum and migration law are flexible enough to give the Union legislature discretion in this area. On the one hand, the EU shall adopt measures comprising standards concerning the conditions for the reception of applicants for asylum or subsidiary protection.⁷³ On the other, rules should be enacted – inter alia – in the area of illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorization.⁷⁴

Approximation of detention in criminal law is more problematic. A possible objection to an EU competence is that the legal basis does not empower the Union to adopt measures in this area. To this end, Article 82(1) TFEU refers to the possibility of minimum harmonisation with regard to individual rights in *criminal procedure*. Such a concept should not be used interchangeably with that of criminal proceedings. A systematic interpretation rests on the understanding of criminal procedure and criminal proceedings as two concentric circles, with the latter being entirely contained in the – broader – former one. The procedural rights Directives state the objective of establishing rights in criminal proceedings. They define their scope of application as *until the final judgment*.

The coincidence between criminal proceedings and final judgment implies a broader scope for criminal procedure, which naturally includes enforcement as well. Such a finding must be read in combination with the legal basis in EU procedural criminal law as laid down in Article 82(2)(b) TFEU. That provision confers upon the EU the power to adopt minimum rules on rights of individuals in criminal procedure. As the Treaty refers to individual rights, this article argues for the

73 TFEU, Article 77(2)(f).

74 TFEU, Article 79(2)(c).

proceduralisation of detention conditions. By turning upside down the existing perspective, a possible Directive should understand those conditions as individual rights rather than as impersonal standards. The European Prison Rules should constitute the main source of the EU legislative initiative. Where the latter refer to the required characteristics of eg accommodation, hygiene, nutrition, clothing and bedding,⁷⁵ a Directive should lay down those provisions as detainees' entitlement. This should be supported by the inclusion of a system of remedies for their violation. Preparatory work of Article 82 TFEU. It is true that, on looking at the preparatory work of Article 82 TFEU, that legal basis seems meant to cover situations under Article 6 ECHR and not Article 5 ECHR. That objection can be overcome by reasons of effectiveness of EU law, first. The establishment of common standards would facilitate mutual recognition as required by the legal basis under examination. Secondly, the original intention of the Treaty-makers would be adjusted and aligned with the EU-specific understanding of the right to liberty proposed here.

The present argument does not overlook the political and legal difficulties that would emerge, such as the definition of the concept of minimum rules, objections about proportionality and subsidiarity, or the recourse to the so-called emergency brake under Article 82(3) TFEU. However, the foregoing argument aims to establish a first step toward a legal debate concerning approximation of detention conditions at EU law level.

7. Conclusions

Over last years, situations of poor detention conditions throughout the Union have sparked complex legal questions. Concerns about fundamental rights protection sit next to dilemmas on the limitations to the operation of EU law and the competences of the Union legislature. The scholarship has not engaged extensively with the reconstruction of a systematic role for detention conditions in EU law, scattered across different bits and pieces of legislation and jurisprudence. This paper has tried to contribute an original perspective to the debate, offering a more unitary picture of such a legal phenomenon.

The methodological assumption is that issues of deprivation of liberty must be understood in the context of the polity where they take place. As for the Union, this means a legal order built with the construction and preservation of a borderless area in mind. As known, that objective has been pursued through rules promoting *and* defending free movement. The latter famously underlie the creation of the AFSJ, where compensatory measures have been adopted to compensate for the abolition of internal frontiers. Instruments of asylum, migration and criminal law have created a system of quasi-automatic intra-EU transfer of persons based on: the interoperation between static and dynamic rules; the principle of mutual trust and the relative presumption that member states comply with fundamental rights. While detention broadly understood has been conspicuously studied as a key tool to those three areas, the potential of detention conditions for the system of intra-EU transfer of persons has been underexplored.

In that context, poor detention conditions are an essential factor to assess when implementing forced movement within the EU. The CJEU has considered detention conditions as a ground for non-execution exclusively through Article 4 CFREU, as part of the *exceptional circumstances* test stated in *Opinion 2/13*. This paper has submitted the importance of detention conditions under the right to liberty and therefore beyond inhumane treatment. If deprivation of liberty shall be carried out according to the procedures established by law, the definition and

⁷⁵ European Prison Rules, sections 16 and ff.

application of clear legal rules on living standards – including provisions on functioning of centres - determine the way in which detention is carried out. Therefore, they must be part of the established procedures requirement under Article 6 CFREU.

The *LM* ruling clarifies that the exceptionality regards the violation of an essential aspect of a right connected to the EU values stated in Article 2 TEU. The procedures requirement of the right to liberty can be jeopardised because rules on detention conditions are too vague in content, contained in an appropriate source of law or not respected in practice. With a centrepiece of that right in danger and the perspective of arbitrary deprivation of liberty, a stronghold of the rule of law would be seriously under pressure.

By building upon the approach to the right to liberty proposed in this research, it is argued that approximation of detention conditions in EU law would be one of the possible steps to counter the risk. The Directives on individual rights in criminal proceedings show that trust may not only be presumed, but must be fed by establishing a level-playing field capable of increasing the existing standards of protection. Article 82 TFEU connects the enactment of minimum rules on individual rights in criminal procedure to the facilitation of mutual recognition. A systematic interpretation of the legal basis and the procedural rights Directives reveals an EU understanding of criminal procedure that goes beyond the issue of the final judgment, therefore encompassing enforcement of penalties. Over the years, the introduction of common standards has proved to increase mutual trust and therefore foster inter-state cooperation. The paper has put forward the proceduralisation of detention conditions, with the latter conceived of and drafted as individual rights. While cognisant of the legal and political questions following the identification of a proper legal basis, the argument meant to foster a debate on a burning issue of EU law still insufficiently addressed.